No. 10-___

IN THE UNITED STATES SUPREME COURT

IN RE: DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANNSON, AND PROTECT-MARRIAGE.COM—YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

DENNIS HOLLINGSWORTH, et al., *Petitioners*

v.

KRISTEN M. PERRY, SANDRA B. STIER, PAUL K. KATAMI, JEFFREY J. ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO, NON-PARTY THE MEDIA COALITION, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, EDMUND G. BROWN, JR., in his official capacity as Attorney General of California, MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics, LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda, DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, and HAK-SHING WILLIAM TAM, *Respondents*.

ON APPLICATION FOR IMMEDIATE STAY OF THE DISTRICT COURT'S ORDER PERMITTING PUBLIC BROADCAST OF TRIAL PROCEEDINGS

DIRECTED TO HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPLICATION OF DENNIS HOLLINGSWORTH, GAIL KNIGHT, MARTIN GUTIERREZ, MARK JANSSON, AND PROTECTMARRIAGE.COM TO STAY THE DISTRICT COURT'S ORDER PERMITTING PUBLIC BROADCAST OF A FEDERAL DISTRICT COURT PROCEEDING

To the Honorable Anthony M. Kennedy, Associate Justice of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioners[1] respectfully apply for an immediate stay, to halt the broadcast on YouTube of the trial in this case commencing January 11, 2010, pending final resolution of a forthcoming petition for a writ of certiorari to review the judgment of the Court of Appeals denying Petitioners' mandamus petition or in the alternative, a petition of mandamus to review the order dated January 7, 2010, entered by the District Court for the Northern District of California, designating this case for public broadcast on YouTube as part of the Ninth Circuit's new "pilot program." If the district court proceeds with its unlawful plan to broadcast the trial proceedings in this case on YouTube, Petitioners will suffer irreparable harm as their fundamental right to a fair trial will be infringed.

Petitioners have attempted to halt the broadcast of the trial proceedings by requesting a stay from the District Court for the Northern District of California and a writ of mandamus from the Court of Appeals for the Ninth Circuit. The court of appeals denied the petition for a writ of mandamus yesterday, January 8, 2010, *see* Exhibit A, and the district court has not ruled on the motion for stay. Because the trial is set to begin on the morning of Monday, January 11, 2010, Petitioners request that this Court immediately stay the district court's order permitting the proceedings in this case to be broadcast.

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[1] Petitioners are not a corporation but a primarily formed ballot committee under California Law. *See* CAL. GOV. CODE §§ 82013 & 82047.5.

INTRODUCTION

This application arises in a case presenting a federal constitutional challenge to Prop 8, which provides that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. Although the case concerns a question of law that can be answered solely by resort to controlling precedent and, if necessary, legislative facts, the district court has ordered a full-scale, multi-week trial. Dozens of witnesses are expected to testify on a range of topics related to the divisive issues of same-sex marriage and sexual orientation in general. On January 7, 2010, the district court formally notified the parties that, subject to the approval of the Chief Judge of the Ninth Circuit, the trial would be broadcast daily on YouTube several hours after the completion of the day's proceedings. *See* Notice to Parties (Jan. 7, 2010) (CA App. (attached as Exhibit B), Ex. 1); Tr. of Hr'g of Jan. 6, 2010 (CA App, Ex. 2) at 6, 46. Although there is no record that Chief Judge Kozinski has yet acted, Petitioners feel compelled to seek relief now to afford this Court adequate time to rule before the trial begins Monday morning. On January 8, 2010, Petitioners filed petition for mandamus in the Ninth Circuit, but that court denied the petition the same day. *See* Exhibit A.

The district court's order is contrary to the long-established policy of the Judicial Conference of the United States—as well as the policies of both the Northern District of California and the Ninth Circuit in effect at least until late December 2009. The district court issued the order pursuant to (i) a purported revision, made on the eve of trial, to the district court's Local Rule 77-3, which had previously prohibited public broadcast, and (ii) a press release by the Ninth Circuit Judicial Council announcing a "pilot program" permitting broadcasting of district court proceedings within the Circuit. Both policies appear to have been

changed with great haste and procedural irregularity solely to ensure that this case would be publicly broadcast.

Congress has mandated that the public be afforded notice and the opportunity to comment before a district court revises a local rule or a circuit judicial council revises a practice or procedure. *See* 28 U.S.C. § 2071(b) & (c)(1); 28 U.S.C. § 332(d). Nonetheless, the Ninth Circuit Judicial Council's announcement failed entirely to comply with this statutory mandate, while the Northern District first offered a belated, truncated opportunity to comment that foreclosed meaningful consideration of the public's views and then at the last minute shifted its rationale in an attempt to take refuge in a statutory exception for rule changes prompted by an "immediate need." Neither process produced carefully considered or detailed guidelines about how a pilot program allowing public broadcast will operate or how it will address the many serious concerns this practice raises.

The questions of whether and how to publicly broadcast trial proceedings are weighty and have for years been the subject of study, debate, proposed legislation, and testimony from dozens of federal judges, including members of this Court. For fifteen years the Judicial Conference of the United States has "consistently" and repeatedly voiced its strong opposition because "camera coverage can do irreparable harm to a citizen's right to a fair and impartial trial." *Cameras in the Courtroom: Hr'g Before the S. Comm. on the Judiciary*, 109th Cong. (Nov. 9, 2005) (statement of Hon. Diarmuid O'Scannlain for the Judicial Conference of the United States) (CA App., Ex. 3) ("Testimony of Judge O'Scannlain") at 40; *see also, e.g.*, Letter from James C. Duff (July 23, 2009) (CA App., Ex. 4) ("Duff Letter") at 2.

Here, the district court, because it has before it a high-profile case, has decided to short-circuit the national debate on this issue, to change its controlling rules in a matter of days through

a process that violates the letter and spirit of the law, and to broadcast on YouTube a trial that has the potential to become a media circus. It has done so without addressing the many concerns cited by the Judicial Conference and the parties in this case.

Indeed, the specific concerns underlying the Judicial Conference's firm opposition are present in spades here. The record is already replete with evidence showing that any publicizing of support for Prop 8 has inevitably led to harassment, economic reprisal, threats, and even physical violence. In this atmosphere, witnesses are understandably quite distressed at the prospect of their testimony being broadcast worldwide on YouTube. Whatever truth there may be to the notion that televising trials will better educate the public about the federal judiciary, "increased public education cannot be allowed to interfere with the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases." Testimony of Judge O'Scannlain, CA App., Ex. 3 at 48.

STATEMENT

Petitioners intervened to defend the amendment to California's constitution because the State declined to do so. When they intervened in June 2009, the long-standing policy of the Ninth Circuit Judicial Council flatly prohibited public broadcast of district court proceedings. *See* Resolution of the Ninth Circuit Judicial Conference (July 2007) (CA App., Ex. 5). Likewise, the Northern District of California's Local Rule 77-3 stated that "the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited." *See* CA App., Ex. 6; *see also* N.D. Cal. Gen. Order No. 58 (CA App., Ex. 7), ¶ III (adopting Judicial Conference's policy against broadcasting district court proceedings).

The Judicial Conference of the United States adopted its current policy in 1996. *See* JCUS-SEP 96, p. 54, *available at* www.uscourts.gov/judconf/96-Sep.pdf. The policy is based upon the potentially negative impact that the public broadcast of trial court proceedings could have on the administration of justice. After an extensive, multi-year study of the issue by the Federal Judicial Center ("FJC"), the Judicial Conference, in 1994, rejected proposals for public broadcast of trial court proceedings. *See* JCUS-SEP 94, pp. 46-47, *available at* www.uscourts.gov/judconf/94-Sep.pdf. "Based upon the data presented, a majority of the Conference concluded that the intimidating effect of cameras on some witnesses and jurors was cause for concern, and the Conference declined to ... to expand camera coverage in civil proceedings." *Id.*

In July 2007, the Ninth Circuit Judicial Conference adopted a resolution recommending that the Judicial Conference of the United States change its policy to permit the broadcast of civil, non-jury trials. *See* CA App., Ex. 6. The Ninth Circuit Judicial Conference also recommended that, "to the extent permitted by Judicial Conference [of the United States] procedures, this Circuit should adopt a Rule that would allow the photographing, recording, and broadcasting of non-jury, civil proceedings before the District Courts in the Ninth Circuit." *Id.*

Despite these recommendations, the Ninth Circuit Judicial Council took no action for nearly two years. In the interim, "[t]he Ninth Circuit Judicial Council considered the resolution at a number of meetings following the 2007 Judicial Conference but deferred action to await possible developments at the national level." Letter from Cathy A. Catterson (May 7, 2009) (CA App., Ex. 8). Finally, in May 2009, for reasons left unstated, the Ninth Circuit Judicial Council decided "that it is appropriate to forward [to the United States Judicial Conference] the [2007]

resolution now and ask that it [be] considered by [the Committee on Court Administration and Case Management] at its June meeting." *Id.*

The Judicial Conference of the United States has not retreated from its policy against the broadcast of district court proceedings. Indeed, as recently as July 2009 the Judicial Conference forcefully reiterated to Congress its concern that broadcasting would interfere with a fair trial. The Judicial Conference emphasized, *inter alia*, its considered judgment that "[t]elevision cameras can intimidate litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast." Duff Letter (CA App., Ex. 4) at 2.

On September 25, 2009, despite the local and national policies barring public broadcast of proceedings in the Northern District, the district court informed the parties that it had received inquiries about publicly broadcasting the trial and asked the parties for their position. Tr. of Hr'g of Sept. 25, 2009 (CA App., Ex. 9) at 70. The court acknowledged that "[t]here are, of course, Judicial Conference positions on this," but stated that "[t]his is all in flux." *Id.* at 72. Plaintiffs, Plaintiff-Intervenors, and the Attorney General (all of whom seek invalidation of Prop 8) stated their support for publicly broadcasting the trial. *See* Doc. No. 215 (CA App., Ex.10). Petitioners opposed, explaining that it would violate the United States Judicial Conference's policy and would threaten the fairness of the trial. *See* Doc. No. 218 (CA App., Ex. 11).

Neither the Ninth Circuit Judicial Council, nor the Northern District as a whole, nor the trial court in this case took any further public action with regard to this issue between September 25 and December 16, the date of the final pretrial conference. However, the presiding judge later informed the parties (on January 6) that he sat on a Judicial Council committee of three judges

created by Chief Judge Kozinski on October 22 "to evaluate the possibility of adopting a Ninth Circuit rule" regarding broadcast of district court proceedings, and he acknowledged that this "case was very much in mind at that time because it had come to prominence then and was thought to be an ideal candidate for consideration." Tr. of Hr'g of Jan. 6, 2009 (CA App., Ex. 2) at 43. Neither the parties nor the public received any notice or opportunity to comment on this proposed policy change.

At the final pre-trial conference, the court announced that although public broadcast was "not permitted" under "current Ninth Circuit policy and rules" or the Northern District's local rules, the Ninth Circuit Judicial Council was considering implementation of a pilot program permitting broadcast of nonjury civil cases. Tr. of Hr'g of Dec. 16, 2009, at 10 (CA App., Ex. 12). The court explained that its "understanding [was] that a proposal to implement that is pending before the Judicial Council of the Ninth Circuit, and may very well be enacted in the very near future," though the court did not yet "have a green light for it." *Id.*

The next day, December 17, the Ninth Circuit Judicial Council issued a "News Release" announcing it "ha[d] approved, on an experimental basis, the limited use of cameras in federal district courts within the circuit." *See* CA App., Ex. 13. The press release provided no details as to how the pilot program would be implemented other than that "[c]ases to be considered for the pilot program will be selected by the chief judge of the district court in consultation with the chief circuit judge." *Id.* No Circuit rule or order permitting the broadcast of trials has been noticed, opened for public comment, or promulgated, nor has the Judicial Council issued any policies or procedures to govern the pilot program.

On December 21, a coalition of media companies (the "Media Coalition") sought leave to televise the trial. Doc. No. 313. On December 23, the Northern District of California posted on

its website "public notice" that the court "has approved a revision of Civil Local Rule 77-3, effective December 22, 2009." *See* CA App., Ex. 14 (screenshot of the webpage on Dec. 29, 2009). The purported amendment carved out an exception to the ban on public broadcasting of proceedings, authorizing "a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom" to allow "the taking of photographs, public broadcasting or televising, or recording for [the] purpose[]" of "participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit." *Id.*

On December 28 and 29, Petitioners opposed the Media Coalition's request, explaining that any change in Ninth Circuit policy or local rules regarding broadcast of district court proceedings would require a sufficient public notice and comment period. Doc. Nos. 324, 326 (CA App., Exs. 15 & 16). Petitioners reiterated that this case implicates the precise concerns that animated the Judicial Conference's policy against broadcast of district court proceedings. Doc. No. 324 at 6-7.

On December 30, the district court set a hearing for January 6, 2010, on the issue of broadcasting the trial. Later that day, the court informed the parties that "in light of the recent change to the Ninth Circuit Judicial Council's policy regarding cameras in district courts and the subsequent amendment of Civil LR 77-3 to conform with Ninth Circuit policy, the court is considering seeking approval from Chief Judge Kozinski to record or webcast the January 6 hearing." Doc. No. 332 at 2. The court ordered that any objections be filed by January 4. *Id.*

In the late afternoon on New Year's Eve, the Northern District removed from its website the posting announcing that it had "approved a revision of Civil Local Rule 77-3, effective December 22, 2009." In its place, the court put up an announcement of a "*proposed* revision of Civil Local Rule 77-3," which it had "approved for public comment." CA App., Ex. 17

(emphasis added). Any comments were to be submitted by January 8, 2010—the Friday before the trial scheduled to begin Monday, January 11. *Id.*

On January 4, 2010, Petitioners objected to public broadcast of the January 6 hearing for the reasons previously stated. Doc. No. 336 (CA App., Ex. 18). Petitioners also explained that pursuant to the court's New Year's Eve announcement, it no longer appeared that the purported amendment to Local Rule 77-3 was operative. *Id.*

Later on January 4, the Northern District removed from its website the posting announcing the "proposed" revision of Rule 77-3 and replaced it with a notice announcing that the court had approved the revision "effective December 22, 2009." CA App., Ex 19. The notice further stated that "[t]he revised rule was adopted pursuant to the 'immediate need' provision of Title 28 Section 2071(e)." *Id.*

On January 6, the court held a hearing that was recorded on video over Petitioners' objections, for later posting on YouTube. The court announced that the live broadcast of the trial would go not only to the overflow courtroom in the courthouse, but also to the Ninth Circuit's San Francisco courthouse and courthouses in Seattle, Portland, Pasadena, and Chicago. Tr. of Hr'g of Jan. 6, 2009 (CA App., Ex. 2) at 16-17. The court further stated that this case was appropriate for public broadcast and that if Chief Judge Kozinski approved, the trial would be recorded and broadcast beginning Monday January 11, 2010. *Id.* at 46. A court technician explained to the parties that proceedings would be recorded using three cameras and the resulting broadcast would then be uploaded for posting on YouTube, with a delay due to the website's processing requirements. *Id.* at 4, 6. On January 7, the district court formally notified the parties that, subject to the approval of the Chief Judge of the Ninth Circuit, the trial would be broadcast

daily on YouTube according to the procedures described during the previous day's hearing. *See* Notice to Parties (Jan. 7, 2010) (CA App., Ex. 1).

Yesterday, Petitioners moved the district court for a stay of its order directing that the trial proceedings in this case would be broadcast. *See* Doc. No. 371. Petitioners simultaneously petitioned the court of appeals for a writ of mandamus or prohibition barring the district court from broadcasting the trial. The district court has not yet ruled on the stay motion, but the court of appeals denied the petition last night in a terse order stating that "Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus." *See* Exhibit A.

STANDARDS FOR GRANTING THE STAY

"The standards for granting a stay pending disposition of a petition for certiorari are well settled. A Circuit Justice is required to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Deaver v. United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers) (quotation marks omitted); *see also San Diegans for the Mt. Soledad National War Memorial*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) ("a Circuit Justice must 'try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.' " (quoting *INS Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers)).

In deciding whether to grant certiorari, the Court considers not only whether the decision of the lower court conflicts with the decision of this Court or a coordinate court, but also whether

the ruling "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a); *see Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 73-74 (2003) (exercising "supervisory power" to grant certiorari where Court of Appeals for the Ninth Circuit allowed non-Article III judge to sit on panel).

Presumably, similar standards apply in considering whether to grant an application for a stay pending the filing and disposition of a petition for mandamus. Thus, if the Circuit Justice concludes that four Justices are likely to vote to issue the writ, that the Petitioner will suffer irreparable harm absent the stay, and that the "stay equities" favor issuance of the writ, a stay should be granted. This Court requires that three conditions be satisfied before a writ of mandamus may issue:

> First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires,"—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy "'the burden of showing that [his] right to issuance of the writ is "clear and indisputable."'" Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. These hurdles, however demanding, are not insuperable.

Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 380-81 (2004) (citation omitted).

REASONS FOR GRANTING THE STAY

This case presents a compelling need for a stay because the proceedings below have departed far from the usual course of judicial proceedings. Whether to broadcast trial court proceedings, especially in controversial, high-profile cases such as this, is an issue of surpassing national significance. The district court's decision to publicly broadcast the trial proceedings in this case is not only in the teeth of the long-standing policy of the Judicial Conference of the

United States, of the policy of nearly every other federal jurisdiction, and of views expressed by several Members of this Court, but it is also the result of an unlawful process used to ensure that the proceedings in this particular case would be broadcast, regardless of the consequences. If that were not reason enough to stay the district court's order to broadcast the trial proceedings, the fact that that order will cause Petitioners and many witnesses irreparable harm—and indeed will undermine Petitioners' fundamental constitutional right to a fair trial—compels intervention. Unless the district court's order permitting broadcast are stayed immediately, later review by this Court will be effectively moot.

I. Absent Immediate Stay, Petitioners Have No Other Means of Relief.

Appeal following a televised trial cannot remedy the harm flowing from the broadcast. Many of the likely adverse effects of broadcasting this trial—harassment of witnesses, threats to the safety and security of trial participants, unnecessary public exposure and ridicule of trial participants—cannot be corrected on appeal. "[D]ecades of experience and study," including the FJC study of a multi-year, multi-district pilot program, have demonstrated a variety of harms that arise from public broadcast of district court proceedings, leading the Judicial Conference of the United States to "consistently" conclude "that camera coverage can do *irreparable* harm to a citizen's right to a fair and impartial trial." Testimony of Judge O'Scannlain (CA App., Ex. 3) at 40 (emphasis added); Duff Letter (CA App., Ex. 4) at 1.[2]

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[2] *See also Cameras in the Courtroom, The "Sunshine in the Courtroom Act of 2007," H.R. 2128, Hr'g Before the H. Judiciary Comm.* (Sept. 27, 2007) (statement of Hon. John R. Tunheim for the Judicial Conference of the United States) ("camera coverage can do irreparable harm to a citizen's right to a fair and impartial trial") (CA App., Ex. 20); Testimony of Judge Becker (CA App., Ex. 21) (public broadcast of district court proceedings "can result in real and irreparable harm"). The United States Department of Justice—the federal courts' most frequent litigant—also opposes broadcasting district court proceedings. *See, e.g., Cameras in the Courtroom, The "Sunshine in the Courtroom Act of 2007," Hr. 2128, Hr'g Before the H.*

(i) *Effect on Witnesses*. This Court has long recognized that "[t]he impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable." *Estes v. Texas*, 381 U.S. 532, 547 (1965). The *Estes* Court concisely summarized many of the potential adverse effects on witnesses:

> Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and "cranks" might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot "prove" the existence of such factors. Yet we all know from experience that they exist.

Id.; *see also id.* at 591 (Harlan, J., concurring).

Although *Estes* involved a criminal trial, the Judicial Conference of the United States has recognized that its insights apply equally to civil proceedings. The FJC study of its three-year pilot program found, *inter alia*, that "64 percent of the participating trial judges and 40 percent of the participating attorneys reported that at least to some extent cameras make witnesses more nervous than they otherwise would be" and that "46 percent of the trial judges believed that at least to some extent cameras make witnesses less willing to appear in court." Testimony of Judge Becker (CA App., Ex. 21) at 1-2. Based on these results, the Judicial Conference has repeatedly and consistently concluded that a witness "will often act differently when he or she knows, or even believes that thousands of people are watching and listening to the story." *Id.*; *see also* Duff Ltr. (CA App., Ex. 4) at 2 ("the presence of cameras in a trial court will encourage some participants to become more dramatic, to pontificate about their personal views, to promote commercial interests to a national audience, or to lengthen their appearance on camera").

Judiciary Comm. (Sept. 27, 2007) (statement of John C. Richter for the Dep't of Justice) (CA App., Ex. 22).

Most troubling, public broadcast "can intimidate ... witnesses," who might "refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast." Duff Letter (CA App., Ex. 4) at 2; *see also Estes*, 381 U.S. at 591 (Harlan, J., concurring) ("there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a 'hidden audience' of unknown but large dimensions"); Testimony of Judge O'Scannlain (CA App., Ex. 3) at 44. Further, the Judicial Conference has found these "disquieting" insights likely to be far more pervasive and problematic in "truly high-profile cases," like this one. Testimony of Judge Becker (CA App., Ex. 21).[3]

Plaintiffs contended below that any concerns a particular witness might have can be addressed by the district court's discretion to bar public broadcast of specific testimony or "control the format and timing of all broadcast transmissions." Doc. No. 327 at 3. This argument fails for several reasons. First, any control the judge exercises over the format and timing of the broadcast is illusory, for once the video is released, it could easily be altered and disseminated widely by those with modest technical skill and an agenda. Second, barring public broadcast of a particular witness, or blurring his or her face or voice, only serves to shine an even brighter spotlight on that particular witness. As Judge Becker observed on behalf of the Judicial Conference, "[p]roviding [a witness] with the choice whether to testify in the open or blur their image and voice would be cold comfort indeed." CA App., Ex. 21 at 2. Third, Plaintiffs' contention ignores that the effect of public broadcast is a two-edged sword: some witnesses will

[3] The Judicial Conference has also repeatedly expressed concerns about the effect of public broadcast on witness privacy. *See* Testimony of Judge O'Scannlain (CA App., Ex. 3) at 54-55; Testimony of Judge Becker (CA App., Ex. 21) at 8-9; Duff Letter (CA App., Ex. 4) at 2.

shy away from cameras, others will crave the spotlight and shade their testimony for dramatic effect. A trial judge cannot determine in advance whether a witness will fall into this latter category. Finally, Judge Becker explained that a district court's discretion is no certain salve for the wounds of public broadcast, for they often arise unexpectedly. "Federal judges are not clairvoyants"; one never knows "what is going to happen in a trial." *Id.*

In this case, these concerns are not just hypothetical. *All* of Petitioners' witnesses have expressed concern over the potential public broadcast of trial proceedings, and some have stated that they will refuse to testify if the district court goes forward with its plan. Their distress is not unreasonable, as the record reflects repeated harassment of Prop 8 supporters. *See* Doc. Nos. 187-1; 187-2 at ¶¶ 10-12; 187-9 at ¶¶ 6-8; 187-9 at 12-15; 187-11; 187-12 at ¶¶ 5-6; 187-13 at ¶ 8; *see also* Thomas M. Messner, *The Price of Prop 8*, *available at* www.heritage.org/Research/Family/bg2328.cfm; www.youtube.com/watch?v=hcKJEHrvwDI (documenting instance of harassment). This campaign of harassment and reprisal has often been "targeted and coordinated," Messner, *supra*, and the retaliation has often been quite serious. *See, e.g.*, Doc No. 187-11 at 81 (Brad Stone, *Disclosure, Magnified on the Web*, N.Y. TIMES (Feb. 8, 2009) ("Some donors to groups supporting the measure have received death threats and envelopes containing a powdery white substance ...."). Broadcasting the trial would vastly increase the likelihood that trial participants would face similar experiences.

Broadcasting this trial would also impinge upon the privacy interests of witnesses, "some of whom are only tangentially related to the case, but about whom very personal and identifying information might be revealed." Duff Letter (CA App., Ex. 4) at 2. Already, one website "takes the names and ZIP codes of people who donated to the ballot measure ... and overlays the data on a Google map." Doc No. 187-11 at 81. Another website published the name, hometown,

home phone numbers, workplace, workplace contact information, and pictures of Prop 8 supporters so that "whenever someone Googles them this [website] will come up." *Id.* at 55, 62, 65-66, 73, 77.

(ii) *Effect on Attorneys.* The FJC study revealed that "twenty-seven percent of the attorneys reported that the cameras distracted them." Testimony of Judge Becker (CA App., Ex. 21) at 2. And "[f]ifty-six percent of the appellate judges found that, to some extent or greater, cameras cause attorneys to change the emphasis or content of their oral arguments." *Id.* Many judges also concluded that "cameras caused attorneys to be more theatrical in their presentations." *Id.* As Judge O'Scannlain explained to Congress, "[c]ameras provide a very strong temptation for ... attorneys ... to try their cases in the court of public opinion rather than in a court of law." CA App., Ex. 3 at 52; *see also* Duff Letter (CA App., Ex. 4) at 2.

(iii) *Effect on Judges.* The Judicial Conference has also cited "disturbing reports about the effect of ... cameras on judges," with "[n]ine percent of ... trial judges report[ing] that at least to some extent the cameras caused judges to avoid unpopular decisions or positions." Testimony of Judge Becker (CA App., Ex. 21) at 2. And "34 percent [of appellate judges] reported that at least to some extent cameras cause judges to change the emphasis or content of their questions at oral argument." *Id.* And these are judges who *self-reported* their views.

(iv) *Security Concerns.* The Judicial Conference has repeatedly stressed:

> [T]he presence of cameras in a trial courtroom ... increases security and safety issues. Broadcasting the images of judges and court employees, such as court reporters, courtroom deputies, and law clerks, makes them more easily identified as targets by those who would attempt to influence the outcome of the matter or exact retribution for an unpopular court ruling. Threats against judges, lawyers, and other participants could increase even beyond the current disturbing level. Cameras create similar security concerns for law enforcement personnel present in the courtroom, including U.S. marshals and U.S. attorneys and their staffs.

Duff Letter (CA App., Ex. 4) at 3; *see also* Testimony of Judge O'Scannlain (CA App., Ex. 3) at 52-53. Security is particularly important today, as annual "[t]hreats against federal judges, U.S. Attorneys, Assistant U.S. Attorneys ..., and other court officials ... have more than doubled during the past several years, increasing from 592 in fiscal year (FY) 2003 to 1,278 in FY 2008." U.S. Dep't of Justice, Office of the Inspector General, *Review of the Protection of the Judiciary and the United States Attorneys* (CA App., Ex. 23) at 1 (Dec. 2009).

* * *

Finally, as Judge Becker explained, all of these concerns arose just from a study of low-profile cases. He warned that in "truly high-profile cases" one can "[j]ust imagine what the findings would be." CA App., Ex. 21 at 2.

Plaintiffs discount all of the Judicial Conference's concerns, claiming that the First Amendment grants a right to public broadcast of this trial. *See* Doc Nos. 327, 334. This contention is without foundation. As Judge O'Scannlain explained, "increased public education cannot be allowed to interfere with the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases." CA App., Ex. 3 at 48. And "today, as in the past, federal court proceedings *are* open to the public; however, nothing in the First Amendment *requires* televised trials." *Id.* at 57. Judge O'Scannlain noted that *Estes*, *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984), and *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986), all "forcefully make the point that, while all trials are public, there is no constitutional right of media to broadcast federal district court or appellate court proceedings." *Id.* at 57-59. And just last year, the First Circuit rebuffed this very argument when made by broadcasters in another case that elicited significant public interest. *See In re Sony BMG Music Entertainment*, 564 F.3d 1, 8-9 (1st Cir. 2009) ("the venerable right of

members of the public to attend federal court proceedings is far removed from an imagined entitlement to view court proceedings remotely on a computer screen").

II. The Full Court Would Very Likely Grant a Writ of Certiorari or a Writ of Mandamus and Vacate the Order Designating This Case for Public Broadcast

Some Members of this Court have expressed strong skepticism about the wisdom of broadcasting judicial proceedings. But quite apart from the views of individual Justices on the merits of the issue, the courts below did not follow the statutorily mandated processes for effecting so fundamental a change in the policies and procedures governing federal court trials.

At the December 16, 2009, pretrial conference, the district court correctly acknowledged that it lacked authority to permit public broadcast of the trial in this case. *See* Tr. of Hr'g of Dec. 16, 2009 (CA App., Ex. 12) at 10. Local Rule 77-3 unambiguously prohibited it, as did the policy of the Ninth Circuit Judicial Council and the Judicial Conference of the United States. Local Rule 77-3 "has the force of law," *Weil v. Neary*, 278 U.S. 160, 169 (1929), and therefore bound the trial court. *See, e.g., United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 112 (2d Cir. 1984) (district judge bound by local rule prohibiting recording of proceedings); *United States v. Hastings*, 695 F.2d 1278, 1279 nn.4-5 (11th Cir. 1983) (same).

In similar circumstances, the First Circuit recently issued a writ of mandamus overturning an order permitting a webcast of a trial. *See Sony*, 564 F.3d 1. Although a local rule barred the broadcast, *see id.* at 10, the trial court had sought to read into the rule discretionary authority to allow it. Declaring that "the Judicial Conference's unequivocal stance against the broadcasting of civil proceedings ... is entitled to substantial weight," the First Circuit held the trial court lacked discretion to broadcast the trial. *Id.* at 7. The court of appeals emphasized " 'that the intimidating effect of cameras' in the courtroom presented 'cause for concern.' " *Id.*; *see also In re Complaint Against District Judge Billy Joe McDade*, No. 07-09-90083 (7th Cir. Sept. 28,

2009) (Easterbrook, C.J.) (district judge "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" by permitting broadcast of civil trial contrary to local rule and policies of Judicial Conference and Seventh Circuit Judicial Council).

The district court in this case thus rests its order permitting public broadcast of the upcoming trial entirely upon the revision to Local Rule 77-3 promulgated on January 4 and the Circuit Judicial Council's December 17 press release announcing the pilot program. But neither policy change was made with statutorily required public notice and opportunity for comment and thus neither authorized the district court's order. Moreover, the district court's order violates Petitioners' due process rights.

A. The Purported Revision of Local Rule 77-3

Federal district courts have the power to promulgate local rules and to amend those rules, but "[a]ny rule prescribed by a court, other than the Supreme Court, ... shall be prescribed only after giving appropriate public notice and an opportunity for comment." 28 U.S.C. § 2071(b); *see also* FED. R. CIV. P. 83(a)(1) (district court may amend rules only "[a]fter giving public notice and an opportunity for comment"); N.D. Cal L.R. 83-3(a) ("Before becoming effective, any proposed substantive modification of the local rules shall be subject to public comment ...."); *United States v. Hernandez*, 251 F.3d 1247, 1251 (9th Cir. 2001).[4]

On December 23, 2009, the Northern District announced on its website that it had revised Local Rule 77-3, effective December 22. *See* CA App., Ex. 14; Doc. No. 332 (order of Dec. 30, 2009) (recognizing the "recent ... amendment of Civil LR 77-3"). However, after Petitioners objected to the lack of prior public notice and opportunity for comment, *see* Doc. Nos. 324, 326,

[4] Before prescribing a local rule, a district court must also "appoint an advisory committee for the study of the rules of practice ... of such court." 28 U.S.C. § 2077(b); *see also* Local Rule 83-1 ("Any proposed substantive modification or amendment of these local rules must be submitted to a Local Rules Advisory Committee for its review ....").

the district court, late in the day on New Year's Eve, removed from its website the notice of the completed revision and substituted a notice of "proposed" revision. CA App., Exs. 15 & 16. The notice stated that a comment period would be open through Friday, January 8, 2010—a total of five business days following the New Year's holiday weekend for interested persons to submit comments on the proposed revision to Local Rule 77-3.

On January 4, 2010, the district court again revised its posting, this time removing the "proposed" revision to Local Rule 77-3 and substituting a notice stating that the revision had been "adopted" effective December 22, 2009. *See* CA App., Ex. 19. The notice stated that the "[t]he revised rule was adopted pursuant to the 'immediate need' provision of Title 28 Section 2071(e)." *Id.*

This haphazard process does not come close to satisfying the statutory requirement of appropriate advance public notice and an opportunity for comment. *Cf. Miner v. Atlass*, 363 U.S. 641, 650 (1960) (procedure for promulgating federal civil rules is "designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords"). Courts ordinarily allow at least 30 days for comment on a proposed local rule.[5] That conforms to the agency practice under the Administrative Procedure Act, which was intended to guide judicial rulemaking. *See* Notes of Advisory Committee on 1985 Amendments to FED. R. CIV. P. 83. Agencies "usually" provide a comment period of "thirty days or more." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992); *see also Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984)

[5] *See, e.g.*, United States Court of Appeals for the Ninth Circuit, *Opportunity for Comment – Rules Governing Judicial Misconduct Complaints* (Dec. 21, 2009) (30-day comment period) (CA App., Ex. 24).

(Administrative Conference suggests 60 days, and concludes that "the shortest period in which parties can meaningfully review a proposed rule and file informed responses is thirty days") (quotation marks omitted).

The five business days afforded by the Northern District for comment was therefore patently inadequate—especially for an issue that the Judiciary and Congress have spent years debating. It is doubtful that many interested persons became aware of the New Year's Eve notice before the comment period expired. And given the haste and determination with which the district court has sought to revise the local rule—an effort that, as discussed below, reached its zenith when the court implemented the revision even before the truncated comment period had ended—it appears no serious consideration would have been or will be given to the views of the commenters who managed to meet the deadline. Especially given the seismic shift in policy effected by the revision—contravening the long-established policy of the Judicial Conference of the United States based on the fear that broadcasting would deprive litigants of a fair trial (which policy is "at the very least entitled to respectful consideration," *Sony*, 564 F.3d at 6)—this process was woefully inadequate.

A local rule adopted without appropriate notice and a meaningful opportunity for comment is invalid and unenforceable. *United States v. Terry*, 11 F.3d at110, 113 (9th Cir. 1993); *see also United States v. Klubock*, 832 F.2d 664, 671-75 (1st Cir. 1987) (Breyer, J., dissenting) (local rule "is too important, its ramifications too complex, its contours too uncertain" to be adopted without " 'appropriate public notice and an opportunity to comment' ").

Finally, the district court's last-minute invocation of the "immediate need" exception to the notice and comment mandate, *see* 28 U.S.C. § 2071(e), does not save the revision. There is little case law applying the § 2071(e) "immediate need" exception, *cf. United States v. Carr*,

2006 U.S. Dist. LEXIS 74757, at *3-7 (E.D. Cal. 2006) (invoking § 2071(e) "immediate need" exception to promulgate rule requiring criminal defendants to be fully shackled at initial appearances in light of recent history of threats against judges and other court personnel and participants), but the APA again provides useful guidance. An agency may dispense with the comment period "when [it] for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Courts "construe" the APA's exception "narrowly"; "notice and comment procedures should be waived only when delay would do real harm." *NRDC v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003) (quotation marks omitted).

The district court failed to provide any statement of its reasons for invoking the immediate-need exception here. The Circuit Judicial Council took two years to act on its 2007 resolution in favor of allowing cameras in district courtrooms, and none of the other fourteen district courts in the Ninth Circuit has yet taken any public action to implement the pilot program. As the timeline of events detailed above suggests, the only conceivable "immediate need" was to amend the local rule in time to publicly broadcast this case. In reality, this is not an instance in which a particular case has been selected for televising under a pilot program; it is an instance of a pilot program being created for televising a particular case. No harm could result from delaying the amendment in order to receive and consider comments. The court has an unending stream of cases from which to find a suitable guinea pig. Certainly, such delay would not preclude the court from "execut[ing] its ... duties." *NRDC*, 316 F.3d at 911. On the contrary, as explained above, the district court's precipitate amendment of Local Rule 77-3 so that it could broadcast this controversial case threatens to harm Petitioners by interfering with

"the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases." Testimony of Judge O'Scannlain, CA App., Ex. 3 at 48.

B. Ninth Circuit Judicial Council Policy

Even if the revision to Local Rule 77-3 were otherwise valid, it could not authorize the public broadcast of district court proceedings because the Ninth Circuit Judicial Council has not validly authorized such broadcasts as yet. The court below clearly erred by concluding that the December 17 press release constituted a valid revision of Judicial Council policy.

Congress has authorized the Council to "make all necessary and appropriate orders for the effective and expeditious administration of justice within" the Ninth Circuit. 28 U.S.C. § 332(d)(1). But "[a]ny general order relating to practice and procedure shall be made or amended *only after* giving appropriate public notice and an opportunity for comment." *Id.* (emphasis added). This notice and comment procedure is a "check" placed by Congress on "the delegation of power to [the Council] under § 332(d)(1)." *Russell v. Hug*, 275 F.3d 812, 818 (9th Cir. 2002).

Other than the December 17 press release announcing the Council's vote in favor of a pilot program permitting public broadcast, the Council has not issued anything formally revising its 1996 policy prohibiting the public broadcast of civil trials—no general order, rule, or other official statement of policy. Standing alone, the Circuit Council's vote and subsequent press release do not represent a valid amendment of the 1996 policy and that policy remains in effect.

The invalidity of the Council's action renders the district court's order invalid, for it means that the 1996 Judicial Council policy remains in place and is binding on the trial court. If the Council has not validly launched a pilot or other program, then the new exception in revised Local Rule 77-3 does not apply.

C. The Lack of Guidelines Governing the Pilot Program

In light of the significant concerns raised by the Judicial Conference regarding public broadcast of district court proceedings and the lengthy guidelines that govern broadcast of Ninth Circuit proceedings, it is highly problematic that neither the Northern District nor the Circuit Judicial Council has promulgated or even noticed any rules or guidelines to govern the pilot program. *See Estes*, 381 U.S. at 537, 551 (holding that public broadcast of a trial violated due process where "the rules governing live telecasting ... were changed as the exigencies of the situation seemed to require" and the "day-to-day orders made the trial more confusing to ... the participants"). Even if the *per se* objections to public broadcast are to be ignored, such guidelines are needed to regulate the trial court's discretion in selecting cases for broadcast and placing restrictions on broadcasts. At a minimum, such regulations should provide that public broadcast should be permitted only if all parties and all witnesses consent.

D. Public Broadcast of the Trial in This Case Would Violate Petitioners' Due Process Right to a Fair Trial.

Public broadcast of this trial would violate Petitioners' due process right to a fair trial. In *Estes*, this Court held that "the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." 381 U.S. at 540.[6] There, the Court found public broadcast of a trial violated "the basic requirement of due process"—a "fair trial"—because, *inter alia*, public broadcast might have (i) "impaired" the "quality of the testimony," (ii) affected the responsibilities and demeanor of the judge, and (iii) created "mental—if not physical—harassment" of the defendant. *Id.* at 543, 547, 549 (quotation marks omitted). In this high-profile, highly contentious case, the potential for all these harms and many

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[6] *Estes* involved a criminal trial, but civil litigants have no less of a Fifth Amendment due process right to a fair trial. *See, e.g., Jinro Am., Inc. v. Secure Inv., Inc.*, 266 F.3d 993, 1007 (9th Cir. 2001).

more is great. Thus, Petitioners respectfully submit that in the specific circumstances presented here, public broadcast would violate their due process rights to a fair and impartial trial.[7]

CONCLUSION

For the foregoing reasons, the Court should stay the district court's order permitting the proceedings in this case to be publicly broadcast on YouTube pending the timely filing and disposition of a petition for certiorari or mandamus.

January 9, 2010

Respectfully Submitted,

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[7] In *Chandler v. Florida*, the Court held that *Estes* did not announce a *per se* due process ban on public broadcast, but left open an as-applied due process challenge in an appropriate case. 449 U.S. 560, 573, 582 (1981).

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January 2010, I caused to be served on the following counsel a true and correct copy of the foregoing via electronic mail:

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